

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Standing Rock	)	WC Docket No. 09-197
Telecommunications, Inc.,	)	
To Redefine Rural Service Areas	)	

**REPLY COMMENTS OF STANDING ROCK TELECOMMUNICATIONS, INC.**

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**EXECUTIVE SUMMARY**

On August 24, 2010 the Commission's Wireline Competition Bureau (Bureau) designated Standing Rock Telecommunications, Inc. (Standing Rock) as an eligible telecommunications carrier (ETC) in several wire centers within the Standing Rock Sioux Reservation's boundaries. At the same time, the Bureau deferred action and requested comments on Standing Rock's petition for ETC designation and redefinition for service area within the Standing Rock reservation for areas that would encompass partial wire centers served by rural telephone companies.

Notably, there were no comments filed in direct opposition to the Commission's notice to redefine the wire centers to better reflect the boundaries of the Standing Rock reservation except for those filed by the incumbent West River Telecommunications Cooperative, which has filed in opposition every step in SRTI's ETC and redefinition process. Also of note, is that both of the former Commission Tribal liaisons (there are only two), Shana Barehand and Eric Jensen (as counsel to the National Tribal Telecommunications Association, "NTTA"), filed comments in support of the Commission recognizing Tribal boundaries through this redefinition process.

The government of the Standing Rock Sioux Tribe and Standing Rock Telecommunications, Inc. (SRTI) respectfully request that the Commission, alone, redefine the Commission's outdated boundaries to reflect the boundaries of the Standing Rock Sioux reservation in order that the SRTI may service, and participate in Commission programs for, the entire reservation.

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**REPLY COMMENTS OF STANDING ROCK TELECOMMUNICATIONS, INC.**

**TO COMMENTS ON WHETHER STANDING ROCK SHOULD BE DESIGNATED**  
**AN ELIGIBLE TELECOMMUNICATIONS CARRIER**  
**IN PARTIAL RURAL WIRE CENTERS**  
**SO THAT IT CAN SERVE THE ENTIRE STANDING ROCK SIOUX RESERVATION**

**I. INTRODUCTION**

On August 24, 2010 the Commission's Wireline Competition Bureau (Bureau) designated Standing Rock Telecommunications, Inc. (Standing Rock) as an eligible telecommunications carrier (ETC) in several wire centers within the Standing Rock Sioux Reservation's boundaries.<sup>1</sup> At the same time, the Bureau deferred action on Standing Rock's petition for ETC designation and redefinition for service area within the Standing Rock reservation for areas that would service just the portion of a wire center currently served by a rural telephone company which was on the Standing Rock Sioux reservation.<sup>2</sup> The Commission requested comments because the Commission

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<sup>1</sup> See *Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier*; *Standing Rock Telecommunications, Inc. Petition to Redefine Rural Service Areas*, WC Docket No. 09-197, Memorandum and Order, DA 10-1601 (Wireline Comp. Bur. rel. Aug. 24, 2010).

<sup>2</sup> *Id.* at 10, para. 29; *Petition of Standing Rock Telecommunications, Inc. for Designation as an Eligible Telecommunications Carrier*, WC Docket No. 09-197 (filed Dec. 18, 2009); *Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas*, WC Docket No. 09-197 (filed Feb. 18, 2010); 47 U.S.C. § 214(e)(5).

has not previously considered whether a carrier—including a Tribally owned and operated carrier—may be designated below the wire-center level in order to serve an entire Tribal reservation.

Notably, there were no comments filed in opposition to the Commissions notice to redefine the wire centers to better reflect the boundaries of the Standing Rock reservation except for those filed by the incumbent West River Telecommunications Cooperative, *et al*<sup>3</sup> (Collectively referred to as “West River”), which has filed in opposition every step in SRTIs ETC and redefinition process.

Also of note, is that both of the former Commission Tribal liaisons (there are only two), Shana Barehand<sup>4</sup> and Eric Jensen (as counsel to the National Tribal Telecommunications Association, “NTTA”), filed comments in support of the Commission recognizing Tribal boundaries through this redefinition process (and also in opposition to referring the redefinition to states for concurrence).

In addition to the comments filed in support by former Commission Tribal liaisons, and by the National Tribal Telecommunications Association<sup>5</sup> (which represents all eight currently regulated Tribal telecommunications companies), the California Association of Tribal Governments<sup>6</sup> (CATG), which has been very active in tribal telecommunications, also filed in strong support of every Tribe

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<sup>3</sup> Comments filed by West River Cooperative Telephone Company, South Dakota Telecommunications Association, and the North Dakota Association of Telecommunications Cooperatives, in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“West River”)

<sup>4</sup> Comments by Shana Barehand, in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010) (Filed October 2010) (“Shana Barehand”)

<sup>5</sup> Comments filed by the National Tribal Telecommunications Association, in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“NTTA”)

<sup>6</sup> Comments filed by the California Association of Tribal Governments, in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“CATG”)

having “the right to service its entire reservation” and that the “Commission should not request state consent for decisions wholly contained within a reservation.”

The other comments filed in response to the FCC's August 24, 2010 Public Notice regarding Standing Rock's ETC designation for partial wire centers within its reservation were fairly supportive, simply outlining various policy concerns’ to be considered and encouraging a narrow decision, but none outright opposed.

For example, the United States Telecommunications Association<sup>7</sup>, one of the leading advocacy groups for incumbent local exchange carriers, stated that it “takes no position on Standing Rock's petition for service area modification, but...if its request...should be granted, the order should be very narrowly tailored.”

Similarly, CenturyLink<sup>8</sup> (which is in a pending merger with Qwest) argues that the general policy of designating ETCs at the wire center level should be maintained, but the Commission could consider “whether unique, special circumstances may exist in the exceptional case of Standing Rock's petition to serve the entire Standing Rock Sioux Reservation without serving any additional area outside the reservation.”

Finally, Windstream<sup>9</sup> argues in its comments that the Commission should only grant a partial wire center ETC designation if (1) a Tribally owned and operated carrier seeks to serve its entire Tribal reservation; (2) the area includes the highest cost portions of the wire centers; and (3) the

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<sup>7</sup> Comments filed by the United States Telecommunications Association, in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“USTA”)

<sup>8</sup> Comments filed by CenturyLink in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“CenturyLink”)

<sup>9</sup> Comments filed by Windstream Communications, Inc., in response to, *Comment Sought on Whether Standing Rock Telecommunications, Inc. Should be Designated an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation*, released August 24, 2010, DA 10-1601, (WC Docket No. 09-197) (Filed September 23, 2010). (“Windstream”)

affected wire centers are capable of sustaining more than one ETC. All criteria easily met by Standing Rock's application, as the Commission's August 24 Order found.

In comparison to all the other relatively supportive comments filed, the fears raised in the comments filed by West River seem somewhat out of place. This redefinition of outdated wire centers boundaries will have no bearing on West River's, or any other incumbent's, ability to continue to operate as they currently do and receive the same federal assistance they currently receive. This redefinition would simply respect the boundaries of the Standing Rock Tribe's reservation, and ability to receive federal assistance for providing those services, to all the people who have chosen to live within Standing Rock's reservation.

**II. STANDING ROCK TELECOMMUNICATION, INC'S STUDY AREA SHOULD BE REDEFINED BELOW THE WIRE CENTER LEVEL TO REFLECT THE BOUNDARIES OF THE RESERVATION PER THE REQUEST OF THE TRIBE.**

**A. HIGHLAND CELLULAR DOES NOT APPLY - IT INVOLVED A STATE INCORPORATED CARRIER SERVING STATE LANDS.**

West River spends a good deal of time in its comments<sup>10</sup> focusing on *Highland Cellular*.<sup>11</sup> SRTI respectfully submits that *Highland Cellular* is not a controlling decision with regard to this petition. *Highland Cellular* involved a state incorporated carrier operating on state lands. Neither is true in this instance. SRTI is a Tribal governmental and Tribal licensed carrier serving Tribal lands.

**B. THE PUBLIC POLICY CONCERNS RAISED IN HIGHLAND CELLULAR ARE INAPPLICABLE IN THIS CASE.**

If the Commission were to find that *Highland Cellular* were applicable, SRTI respectfully disagrees with West River's Comments that the Commission should find that "granting an ETC designation to a competitive ETC in a rural telephone company's service area below the wire center is not in the public interest."<sup>12</sup>

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<sup>10</sup> West River Comments at Page 4.

<sup>11</sup> *In the Matter of Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6438 (2004) ("*Highland Cellular*")

<sup>12</sup> West River Comments at Page 4.

While the Commission held in *Highland Cellular* that “making designations for a portion of a rural telephone company’s wire center would be inconsistent with the public interest,” the “public interest” concerns raised in *Highland Cellular* are inapplicable with regard to tailoring Commission boundaries to reflect and respect Tribal reservation boundaries.<sup>13</sup> In fact, the “public interest” concern articulated in *Highland Cellular* is the exact reason SRTI seeks to only service a portion of wire centers in this instance, in order to service an entire “community.” SRTI wants to ensure that everyone living on the entire Standing Rock reservation<sup>14</sup> has the same access to their telecommunication services, which means gaining access to Commission resources for all of the reservation.

The Commission has also expressed concern that this limitation was intended to protect rural consumers from carriers relinquishing their ETC status in the future. The Commission stated that it believes that “requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date.”<sup>15</sup> SRTI and the Standing Rock Sioux Tribe have a substantial vested interest in ensuring that all the people living on the Standing Rock Reservation have good communications services, and that SRTI maintains its ETC status. The Standing Rock Sioux Tribe has been working for over a decade, against substantial institutional barriers and aggressive opposition by some incumbents, to address the service and access problems on the reservation. Standing Rock and SRTI have a very high level of investment in ensuring the success of SRTI and its ETC status, as do all Tribal providers. As stated in NTTA’s comments once a Tribe creates its own tribal provider, they can see an “increase in penetration rates of up to 900 percent.”<sup>16</sup> The stakes are very high for Tribal providers.

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<sup>13</sup> *Highland Cellular*, 19 FCC Rcd 6438 at Para 33.

<sup>14</sup> SRTI strongly objects to West River’s implication that not everyone living on the Standing Rock reservation, regardless of their Tribal affiliation, is a member of our “community.” West River Comments at Page 5-6.

<sup>15</sup> *Federal-State joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, 20 FCC 6371, 6405 Para 77 (2005) (emphasis added) (“*Joint Board on Universal Service*”)

<sup>16</sup> NTTA Comments at Page 2, Para.12.

**C. THE COMMISSION HAS THE AUTHORITY TO WAIVE RULES INCONSISTENT WITH THE PUBLIC INTEREST.**

We respectfully disagree that the Commission's rules or precedent prohibit redefining study areas below the wire center level in order to define study areas along Tribal reservation boundaries (and as discussed in the next section, SRTT's disagrees that they require a referral to the state for ETC or redefinition consent on Tribal lands). However, SRTT agrees with NTTA's comments that the Commission has the ability to waive the rules if they are inconsistent with the "public interest":

"the FCC, under 47 CFR 1.3, may waive adherence to Section 214(e)(5) when exercising its authority under Section 214(e)(6) regarding a tribal area if it is consistent with and pursuant to the greater public interest; necessary to avoid imposing hardship on applicants; for equity reasons; or necessary to promote a more effective implementation of overall policy.... NTTA submits deferring to a tribal request to be viewed as an entire community and an entire service area is the beginning of many necessary and important ameliorative actions the FCC must pursue...."<sup>17</sup>

Therefore, even if the Commission were to find that its rules or decisions lead to a prohibition of this type of redefinition (or required referral to the state), strict interpretation of any precedent or rule (although there is no statutory authority for the *Highland Cellular* holding) is not necessary. The Commission has clearly stated in its decision on the Mescalero Apache Tribe's application to for a rule waiver that "Commission rules may be waived for good cause shown. ... [and] the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance *inconsistent with the public interest*."<sup>18</sup>

Not redefining outdated Commission boundaries to respect Tribal governmental boundaries, at the request of the Tribal government itself, is clearly "inconsistent with the public interest."<sup>19</sup> And as discussed in the next section, requiring a tribal governmental entity to appear before a state

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<sup>17</sup> NTTA Comments at Page 4, Para. 6.

<sup>18</sup> *Mescalero Apache, et al, Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules*. CC Docket No 96-45, DA 01-129, at Para 7. (2001) Citing 47 C.F.R. s13 and *WALT Radio v FCC*, 418 F.2d 1153, 1159 (D.C. Cir 1969), *cert. denied*, 409 U.S. 1027 (1972) (emphasis added)

<sup>19</sup> Additionally, the Commission has made clear that each petition for redefinition of a study area is a "case-specific analysis." *Joint Board on Universal Service*, 20 F.C.C.R. 6371 at Para. 75.

governmental regulatory body which has no jurisdiction over the Tribe in order to receive concurrence for a federal benefit is clearly “inconsistent with the public interest.”

**D. THE COMMISSION HAS FLEXIBILITY TO REDEFINE STUDY PARTIAL WIRE CENTERS WHOLLY CONTAINED WITHIN THE RESERVATION.**

In addition to the rule waiver flexibility, the Commission outlined in the *Twelfth Report and Order* that flexibility must be built into Commission rules and decisions in order to best ensure a respect for “tribal sovereignty and self determination.”

We are mindful that the federal trust doctrine imposes on federal agencies a fiduciary duty to conduct their authority in matters affecting Indian tribes in a manner that protects the interest of the tribes. We are also mindful that federal rules and policies should therefore be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.<sup>20</sup>

The Standing Rock Sioux Tribe has made it very clear in its Petition for ETC Status,<sup>21</sup> Petition for Redefinition of Study Areas<sup>22</sup> that Standing Rock “approves and supports the definition of service area for Standing Rock Telecommunications Inc. to consist of all areas around and within the Standing Rock Indian Reservation.”<sup>23</sup>

The Commission’s own *Indian Policy Statement* clearly recognizes that “Indian Tribes exercise inherent sovereign powers over their members and territory.”<sup>24</sup> In order to respect the Tribe’s “inherent sovereignty” over its own “territory,” the Commission must grant the Tribe ETC status over all of the lands within the Tribe’s own nation, even if that requires reconsideration of how the

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<sup>20</sup> *Twelfth Report and Order*, FCC Rcd 12208 at Para. 119

<sup>21</sup> *Petition of Standing Rock Telecommunications, Inc. for Designation as an Eligible Telecommunications Carrier*, WC Dkt. No. 09-197 (Dec. 18, 2010)

<sup>22</sup> *Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas*, WC Dkt. No. 09-197 (Feb. 18, 2010)

<sup>23</sup> Standing Rock Sioux Tribal Council Resolution #159-10 (March 30, 2010) (emphasis added)

<sup>24</sup> *FCC Statement of Policy Establishing a Government-to-Government Relationship with Indian Tribes*. Pg 3, III. Reaffirmation Of Principles Of Tribal Sovereignty And The Federal Trust Responsibility. (June 23, 2000) (“*Indian Policy Statement*”) (emphasis added)

Commission (not the Tribe) currently draws its boundaries (wire centers). See also, *Executive Order 13175*.<sup>25</sup>

The details of how externally imposed Commission “boundaries” are appropriately adjusted to meet this primary goal are almost inconsequential. There are a number of routes the Commission may take, such as re-drawing wire centers completely to better align with Reservation boundaries, permitting SRTI to service those portions of wire centers on the Reservation (and within its licensed service area), creating on and off-tribal land “zones” within each wire center,<sup>26</sup> or creating a completely new system of measurement by the Commission. What is relevant, is that the Commission incorporate Tribes fully into its analysis and boundary measurements, in order to ensure Tribes may service their own Nations.

**E. MANY WIRE CENTER BOUNDARIES WERE DRAWN WITHOUT CONSIDERATION OF TRIBAL RESERVATION BOUNDARIES.**

In its comments, West River states that “it has been federal policy to maintain the wire center as the minimum geographic area for service area redefinition purposes.”<sup>27</sup> SRTI respectfully submits that this policy has never taken into account the history of the creation of those wire center boundaries with regard to Tribal Reservation boundaries.

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<sup>25</sup> *Executive Order 13175--Consultation and Coordination With Indian Tribal Governments* (November 6, 2000). “Fundamental Principles.” In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles: (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights. (c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination

<sup>26</sup> In the filed *Comments of the South Dakota Independent Telephone Coalition in reference to The Rural Task Force Recommendations to the Federal-State Joint Board on Universal Service* (November 2, 2000), the SDITC, (what is now the South Dakota Telecommunications Association (SDTA)), recognized the need for flexibility in “zones” within wire centers. Pg. 6-7.

<sup>27</sup> West River Comments at Page 3

In *Highland Cellular*, the Commission used “wire centers” as a proxy and easy delineation for “communities.” Specifically the Commission stated that “[a] rural telephone company’s wire center is an appropriate minimum geographic area for ETC designation because rural wire centers typically correspond with county and/or town lines.”<sup>28</sup> The evolution of telecommunications law has not historically been inclusive of Tribal sovereignty and reservation boundaries, and this is certainly the case with the piecemeal development of wire center boundaries. While wire centers may take into consideration county and/or town boundaries they certainly were not created taking into consideration Reservation boundaries.

SRTI agrees that ETC designations should best encompass entire “communities;” which for Tribal lands is the entire Tribal Nation. Wherever possible, it is best to maintain current delineations for ease of all parties affected. However, for a variety of historical and legal reasons, wire centers are not always the best definition of “communities,” especially on Tribal lands.<sup>29</sup>

In most instances, wire center boundaries were often created decades before there was a true appreciation of the sovereign nature of Tribal boundaries and Tribal jurisdiction within the telecommunications field. In much of the west, for example, wire centers boundaries grew up around fence lines and cattle crossing paths. In fact, many of the rights-of-way easements across Tribal lands were granted in the early 1900s without any Tribal approval (Notably, it is staggering that federal law still does not require tribal consent for telecommunications rights-of-way across Indian lands (25 U.S.C. Section 312); a historic anachronism which must be changed.).

The wire center boundaries were created without consultation with Tribes and often without regard to their jurisdiction, boundaries, or even existence, and should not be blindly enforced as a proxy for “communities” for carriers on Indian lands or for service areas on Indian reservations. To

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<sup>28</sup> *Highland Cellular*, 19 FCC Rcd 6438 at Para 33.

<sup>29</sup> In fact, in its filing the CRSTTA expressed that its study area does not correspond to all lands lying within its reservation boundaries. This is unacceptable, and SRTI fully supports CRSTTA’s ETC designation for its entire Nation or “community.”

now enforce these “wire centers” boundaries which were created without regard for Tribal nations and their borders, as an inflexible proxy for “communities” would be institutionalizing a system inconsistent with the Standing Rock Sioux Tribe’s treaty with the United States, the Commission’s federal trust responsibility, and own *Indian Policy Statement*.

**F. THERE IS COMMISSION PRECEDENT FOR DESIGNATING ALONG RESERVATION BOUNDARIES.**

As highlighted in NTTA’s comments regarding past Commission decisions, there is precedent for the Commission recognizing the importance of designating ETC status along Reservation boundaries.

In general, there have been very few tribal carrier ETC designations and study area redefinitions on which to draw. The barriers to entry are enormous, and only six (6) Tribes, out of the 564 Tribes in the United States have been granted ETC status and/or study area redefinition by the Commission, Fort Mojave Telecommunications (1998); Gila River Telecommunications (1998); San Carlos Telecommunications (1998); Tohono O’Odham Telecommunications (1998); Saddleback Communications (Salt River Pima-Maricopa) (1998); Hopi Telecommunications (2007).

None of these Commission ETC designations and Study Area Redefinitions specifically addressed partial wire centers. However, many specifically address the importance of Reservation boundaries, and set ample precedent for the importance of the Commission respecting Tribal Reservation boundaries in its Study Areas redefinition decisions. For example, in the two most recent designations involving Tribal lands (both with non-Tribal carriers), on the Navajo Reservation in Utah (*Smith Bagley*, a non-Tribal carrier) and on the Pine Ridge Reservation in South Dakota (*Western Wireless*) the Commission granted the carriers ETC status consistent with the boundaries of the Reservation.

In *Smith Bagley*, the Commission concluded that Smith Bagley’s “service area consists of the geographic area within the borders of the Reservation. We, therefore, designate SBI as an ETC on

the Navajo Nation Reservation in Utah....”<sup>30</sup> In *Western Wireless*, which like SRTI’s petition involved tribal lands in South Dakota, the Commission explicitly redefined the study area of three rural incumbents to reflect the reservation boundaries:

The designated service area differs from the study areas of three rural telephone companies...in as much as these study areas extend beyond the boundaries of the reservation.... This modification is necessary, however, because under section 214(e) (6) the Commission’s authority to designate carriers as ETCs is limited to areas in which the state does not have jurisdiction.<sup>31</sup>

### **III. THE FEDERAL GOVERNMENT HAS THE SOLE AUTHORITY TO REDEFINE STANDING ROCK’S STUDY AREA AND WIRE CENTERS**

#### **A. THE COMMISSION ALONE SHOULD REDEFINE THE PARTIAL WIRE CENTERS IN THIS INSTANCE.**

The California Association of Tribal Governments’ comments expressed grave concern about the precedent over possibly sending this decision to the state for concurrence. The CATG’s “strongly disagrees that any FCC decision...with regard to service areas solely on SRTI’s lands must ‘not take affect until both the state commission and the Commission agree upon the definition of a rural service area’.”<sup>32</sup> Additionally in its comments, the National Tribal Telecommunications Association (NTTA) states that “In the designation of [the] 7 tribal telcos as ETCs, the Commission has never ceded jurisdiction or delegated authority for the designation of tribal ETC status and service area designation to the state.” The Commission should not reverse this long standing precedent today. SRTI appreciates these comments and would like to expand upon them.

SRTI greatly appreciates the positive government-to-government conversations that have been on-going between SRTI and the South Dakota and North Dakota commissions (SDPUC and

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<sup>30</sup> Order, *In re Federal-State Joint Board on Universal Service, Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, 22 F.C.C.R. 2479, Para 29 (2007)

<sup>31</sup> See *Federal-State Joint Board on Universal Service, Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Memorandum Opinion and Order*, 16 FCC Rcd 18133, 18141(2001). (“*Western Wireless*”) (Note: While not at issue in this petition as SRTI is a Tribal entity, SRTI strongly disagrees with the odd and unworkable bifurcation delineated in *Western Wireless* for the ETC status of a non-Tribal carrier on tribal lands in servicing tribal versus non-tribal customers.)

<sup>32</sup> CATG’s comments at Page 1.

NDPSC) throughout this ETC application process and the Study Area Redefinition process, and SRTI looks forward to a strong and amicable working relationship for years to come. However, like CATG in their comments, SRTI respectfully disagrees that the Commission must obtain state agreement regarding the redefinition of study areas and the portion of wire centers on Tribal lands. Such action is inconsistent with the Commission's *Indian Policy Statement*, the "public interest," and Section 214(e)(6) as applied to Tribal lands. We recognize and respect that the state may have some interest in these actions, but there is appropriate and sufficient opportunity for them to participate in the Commission process.

Commission regulation, 47 CFR 54.207(d) is inapplicable on tribal lands as it precedes the enactment of Section 214(e)(6) and the regulation has never been updated to reflect the new statute (See section on legislative history). The Commission addressed this exact issue in *Western Wireless* when discussing the redefinition of the study area on the Pine Ridge Reservation:

...the Commission rule and process...as set forth in section 54.207 of the Commission's rules, was established prior to the adoption of section 214(e)(6). This rule therefore did not contemplate the current situation in which the Commission, in the absence of state jurisdiction over a carrier, has a statutory obligation to be the sole designating entity under section 214(e)(6).<sup>33</sup>

While there have been subsequent decisions to *Western Wireless* which addressed the intersection of 54.207(d) and 214(e)(6) and found that the Commission must in fact follow the processes of 54.207(d) in seeking state "agreement" (as discussed above in the *Virginia Cellular* and *Highland Cellular* section) none of them involved Tribal lands, and each involved non-governmental

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<sup>33</sup> *Western Wireless*, 16 FCC Rcd. at 18140.

state incorporated entities providing services on state lands.<sup>34</sup> Furthermore, the *Joint Board on Universal Service* have never address the issue specifically with regard to Tribal lands.<sup>35</sup>

In addition, while neither case required wire center redefinition as with SRTI or the same level of study area redefinition as in *Western Wireless*, of the two Tribal lands cases which have been decided since *Highland Cellular* and the *Joint Board on Universal Service*, the Commission did not seek state agreement in either *Smith Bagley* (Navajo Reservation) or *Hopi Telecommunications* (Hopi Tribe).<sup>36</sup>

SRTI is a Tribal governmental entity and all of the portions of the wire centers currently being discussed are wholly within the external boundaries of the Standing Rock Sioux Reservation and is not “subject to the jurisdiction of the state.” Section 214(e)(6) of the Communications Act clearly states that the Commission may designate as an ETC a common carrier “not subject to the jurisdiction of a State commission,”<sup>37</sup> for an established “service area” designated under Section 214(e)(6). Section 214(e)(5) further defines a “service area” as a “geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms.”<sup>38</sup> (emphasis added)

In addition, in the treaty between the U.S. government and the Standing Rock Sioux Tribe (The Fort Laramie Treaty of 1868 or “Treaty”), it is clear that issues involving utilities and infrastructure (“works of utility or necessity”) were intended to be negotiated directly between the

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<sup>34</sup> *In the Matter of Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6438 (2004) (“*Highland Cellular*”); *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the State of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338 (2004) (“*Virginia Cellular*”)

<sup>35</sup> *Federal-State joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, 20 FCC 6371, 6405 Para 77 (2005) (emphasis added) (“*Joint Board on Universal Service*”)

<sup>36</sup> *Order, In re Federal-State Joint Board on Universal Service, Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, 22 F.C.C.R. 2479, Para 29 (2007); *Order, In re Federal-State Joint Board on Universal Service, Hopi Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Hopi Reservation in Arizona*, CC Docket 96-45, DA 07-459 (Jan 31, 2007)

<sup>37</sup> 47 U.S.C. 214(e)(6)

<sup>38</sup> 47 U.S.C. 214(e)(5) “*Service Area*” Defined. (emphasis added)

Tribal government and the federal government.<sup>39</sup> The statute, 214(e)(6), and previous regulations, 54.207(d), must be read in conjunction with the Commission's own canon of interpretation with regard to Tribes, and as such the "federal rules and policies should...be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence."<sup>40</sup>

The Commission stated very clearly in *Western Wireless* that Commission decisions with regard to study area definitions within the boundaries of Tribal lands do not need agreement of the state commissions:

We reject the contention of a few parties that the Commission must consult with the [state] Commission before designating Western Wireless as an ETC for a service area that differs from the rural telephone company's study area. We conclude that the federal-state process in section 214(e)(5) contemplates situations in which only one entity, either the state commission or this Commission, has the authority to designate the rural telephone company's entire study area as the ETC's service area. ...In any event, we do not believe that Congress envisioned that the designating entity might need to involve another regulatory body, or seek its permission, before designating an ETC for a service area otherwise lying wholly within its jurisdiction....<sup>41</sup>

SRTI respects that it is a little more complicated with regard to wire centers which lie both on and off the reservation. But the same principals apply, and the Commission is redefining the portions of the wire centers wholly within the reservation. Just because the Commission did not previously ensure wire centers were drawn consistent with Tribal boundaries, does not change the principals at hand now. North and South Dakota's interest in the effects on any portion of the service areas and wire centers that are beyond Standing Rock's reservation boundaries, can be adequately addressed through their comment and participation in the Commission process.

SRTI strongly disagrees that any Commission decision with regard to the service areas and partial wire centers wholly within Standing Rock's lands must "not take affect until both the state

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<sup>39</sup> *The Treaty of Fort of Laramie of 1868*, 15 Stat. 635 (Apr. 29, 1868).

<sup>40</sup> *Twelfth Report and Order*, FCC Rcd 12208 at Para. 119

<sup>41</sup> *Western Wireless*, 16 FCC Rcd. at 18140.

commission and the Commission agree upon the definition of a rural service area.”<sup>42</sup> It is not in the “public interest” to give a state commission what essentially may amount to “veto” authority over a Tribes ability to provide services, and participate in Commission programs, within its own lands, particularly when Congress acted to clearly define a “streamlined” federal process for Tribal lands. The harm which would be caused by requiring a Tribal Nation to submit to the review of another government,<sup>43</sup> in order to receive what are federal benefits far outweighs any ill-defined and minimal concerns over the simple process of drawing new lines.

**B. LEGISLATIVE HISTORY SHOWS 214(E)(6) WAS DESIGNED TO RESPECT THE UNIQUE ASPECTS OF TRIBAL PROVIDERS AND TRIBAL LANDS**

In their comments NTTA references the Commission’s authority under 214(e)(6) with regard to Tribes. The California Association of Tribal Governments (CATG) also references Congresses intent to “streamline” the process for Tribal lands.<sup>44</sup> While 216(e)(6) may not specifically reference Tribes in the language, Tribes were clearly the thought in its passage (as is also highlighted in the *Twelfth Report and Order*). SRTI would like to reply to NTTA and CATG’s comments with some additional legislative history.

The Cheyenne River Sioux Tribal Telephone Authority (CRSTTA) was the pioneer in tribal telecommunications and in obtaining USF support. It was CRSTTA that lead the path for the passage of 214(e)(6). After beginning the ETC application process CRSTTA recognized that the current statute which required all carriers to apply to a State government for Federal funds did not address situations where the state public utilities commission lacks jurisdiction to designate ETC’s,

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<sup>42</sup> 47 CFR 54.207(d)(2)

<sup>43</sup> There are new Commissioners at the SDPUC, and SRTI has been very grateful for the new and positive working relationship. However, in the case of the Cheyenne River Sioux Tribal Telephone Authority (CRSTTA), the SDPUC denied CRSTTA the right to purchase exchanges that were partially on CRST’s land. *Cheyenne River Sioux Tribe Tel. Auth. V. Public Util. Comm’n of S.D.*, Civil No. 95-288 (S.D. Cir. Ct. Feb 21, 1997), aff’d, 595 N.W. 2d 604 (S.D. 1999). As FCC Commissioner Copps stated in his dissent on the Commissions ruling on the issue, the “effect of the decision of the PUC [was] to prevent Indian-owned telephone companies from purchasing exchanges.” *Memorandum Opinion and Order, Cheyenne River Sioux Tribal Telephone Authority and US WEST Communications Inc Joint Petition for Expedited Ruling Preempting South Dakota Law*, CC Docket No 98-6, FCC 02-222, *Statement of Commissioner Michael J. Copps Concurring in Part, Dissenting in Part* (August 21, 2002)

<sup>44</sup> CATGs Comments at Page 2.

such as within the boundaries of the Cheyenne River Sioux Indian Reservation. Accordingly, the CRSTTA subsequently sought ETC designation from the Commission as the only entity with jurisdiction to designate ETC's within Indian Country.

When first passed into law in 1996, section 214(e) did not include a provision for designating carriers or redefining study areas which were “not subject to the jurisdiction of a state commission,” such as Tribal carriers and carriers serving Tribal lands. Thus, common carriers not subject to state commission jurisdiction were unable to be designated as eligible telecommunications carriers, “most notably, some carriers owned or controlled by native Americans,” as clarified by Congressman Bliley then Chairman of the House Commerce Committee which has oversight over telecommunications.<sup>45</sup> Senator McCain, then Chairman of the Senate Committee on Indian Affairs, further clarified that Congress was amending the Act with the addition of section 214(e)(6) to correct this “oversight.”<sup>46</sup>

Section 214(e)(6) was specifically designed to provide an alternative for Tribal telecommunications carriers and carriers serving Tribal lands, and it did not authorize or anticipate the Commission continuing to send decisions on Tribal carriers and Tribal lands back to the same state where they were not “not subject to state jurisdiction.”

**C. CONGRESS HAS NOT DELEGATED AUTHORITY TO THE COMMISSION TO REQUIRE STATE COMMISSION CONSENT FOR A SERVICE AREA REDEFINITION INVOLVING A COMMON CARRIER NOT SUBJECT TO STATE JURISDICTION.**

As highlighted in the CATG' Comments, the Commission rules were never updated to reflect this new statute and the legislative history surrounding its passage. “Commission regulation 47 CFR 54.207(d)... precedes the enactment of Section 214(e)(6) and as such is inapplicable to petitions on Tribal lands.”<sup>47</sup> SRTI would like to expand upon CATG's comments with regard to the

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<sup>45</sup> 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley).

<sup>46</sup> 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

<sup>47</sup> CATG's Comments at Page 1.

statute only authorizing the Commission to make these decisions for carriers “not subject to state jurisdiction.”

As the Commission is familiar, agencies may only “issue regulations”, or likewise undertake regulatory action, pursuant to authority delegated to it by Congress.<sup>48</sup> The “FCC’s power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it.”<sup>49</sup> Under the plain language of 47 U.S.C. §§ 214(e)(5) & 214(e)(6) (and as interpreted by the Commission in *Western Wireless*), Congress expressly instructed the Commission, and excluded state commissions, from exercising jurisdiction to make ETC and service area redefinition decisions for “common carriers not subject to state jurisdiction.”<sup>50</sup> Referring this study area redefinition to the state would unlawfully cede jurisdiction to the state commission from the Commission of a common carrier service area redefinition that is not subject to state commission jurisdiction, thereby violating Congress’ mandate under 47 U.S.C. §§ 214(e)(5) & (6).

**D. ANY REFERRAL FOR CONSENT SHOULD BE TO THE TRIBAL REGULATORY BODY WITH JURISDICTION OVER THOSE LANDS**

SRTI Strongly agrees with the principles outlined in the comments submitted by former Commission Tribal Liaison, Shana Barehand in which Ms. Barehand emphasizes the need to overlay the federal principles of tribal sovereignty and the federal trust responsibility with the statute with regard to respecting Tribal governmental jurisdiction and regulatory authority:

“As an expert in Indian law and administrative law...there is something fundamentally wrong with allowing a state to have regulatory authority to designate...study areas within Indian Country, particularly as it applies to tribally owned businesses, [and] where the tribe has a regulatory body. I don’t believe there is anything in the Telecom Act or applicable case law that specifically gives the states the authority to designate...within a tribe’s jurisdiction. Absent this specific grant of

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<sup>48</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (DC Cir. 2005)

<sup>49</sup> *Id.* at 698 (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (DC Cir. 2001).

<sup>50</sup> CenturyLink’s comments seem to encourage a case by case waiver regarding referral of Commission decisions on Tribal lands and carriers under 214(e)(6) and 214(e)(5) to the state. SRTI After hopefully ruling favorably on SRTI’s petition, SRTI would respectfully recommend the Commission also consider more formally amend 54.207(d) thru an NPRM proceeding to reflect the addition to the Act that subsequently came about in 214(e)6. The rules should be amended to reflect that the Commission has sole jurisdiction over Indian reservation communications matters.

authority, the FCC should first be required to go to the tribal utility to see if they can designate....”<sup>51</sup>

As discussed earlier, SRTI submits that the Commission alone was delegated authority by Congress under 47 U.S.C. §§ 214(e)(5) & (6) to decide a service area redefinition by a tribally owned wireless carrier operating within Reservation boundaries. However, in the alternative, if the Commission determines that its redefinition decision as to the SRTI service area must be sent to a secondary, local jurisdiction for approval, then that jurisdiction could only be the Standing Rock Sioux Tribe’s regulatory authority that regulates SRTI, not the State of North Dakota or South Dakota. As discussed herein and in SRTI’s filings below, the State has no jurisdiction over the Standing Rock Sioux Tribe, Standing Rock has its own utility authority, and SRTI is an entity of the tribe. If the Commission still feels compelled to send something back for concurrence to the state, they can solely decide upon the areas within the reservation and have that decision take effect immediately, and send the portions of the wire centers off the reservation back to the state for concurrence.

**E. PARTIES WITH A POSSIBLE INTEREST, LIKE A STATE, HAVE SUFFICIENT OPPORTUNITIES TO PARTICIPATE WITHIN THE FCC PROCESS.**

It is notable that neither the State of South Dakota nor the State of North Dakota chose to submit comments, and SRTI therefore chooses reply to the lack of submitted comments. The portion of the wire centers at issue here are wholly within the Standing Rock Reservation. Neither the carrier SRTI nor its service area currently address any areas or portions of wire center outside the Reservation boundaries. SRTI recognizes that there remains a portion of the wire centers off the Standing Rock Reservation as well. However, the redefinition of the portion of the wire centers on the Standing Rock Reservation has very little affect on the portions of the wire centers remaining off Reservation. It doesn’t change the status of any of the carriers, it doesn’t change any of the federal or other resources available to them, it is simply a new delineation, the drawing of a new line. The

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<sup>51</sup> Shana Barehand Comments at Page 1.

Commission is redefining the portion of the wire centers and study areas wholly within the reservation, and not subject to state jurisdiction.

In addition to it being inconsistent with the principals of sovereignty and self-determination to require the Tribes to go both to the U.S. government and then to a state government, and is also impractical and places Tribal providers at a financial disadvantage.

Indian Country consists of some of the most sparsely populated and the least served areas in the nation. As such, the economics of servicing these areas are extremely difficult. Standing Rock, for example, has been working to create a provider for over a decade. The legal costs and operational costs affiliated with the delays and extra work of having to work with both the federal government and possibly two state governments is nearly crippling. In the case of STRI it has more than doubled its legal costs and threatened the company's nascent budget. For a newly minted tribal company, these increased costs and substantial delays could prove fatal.

#### **IV. CONCLUSION**

In conclusion any speculative concerns about redefining the Commissions own boundaries below the wire center level for Tribal carriers on tribal lands, are far outweighed by the positive prospect of fixing a historical error by respecting Tribal reservation boundaries and prospect of dramatically increasing service and use rates for one of the most underserved populations in the nation. In keeping with this same principle, it is equally important, and consistent with Standing Rock's treaty, the Commissions own *Indian Policy*, the *Twelfth Report and Order*,<sup>52</sup> the Commission's decision in *Western Wireless*, and the canons of statutory interpretation, for the Commission to respect the Tribal-Federal relationship and make this determination without sending it to a third government, the states, for consent.

The government of the Standing Rock Sioux Tribe and Standing Rock Telecommunications, Inc. (SRTI) respectfully request that the Commission, alone, redefine the

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<sup>52</sup> *Twelfth Report and Order*, FCC Rcd 12208 at Para. 119

Commission's outdated boundaries to reflect the boundaries of the Standing Rock Sioux reservation in order that the SRTI may service, and participate in Commission programs for, the entire reservation.

Respectfully submitted,  
\_\_\_\_\_/s/ \_\_\_\_ filed electronically\_\_\_\_

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Filed October 25, 2010